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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 6th July 2012

No. 5231—IR-(ID)-9/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 16th June 2012 in I. D. Case No. 21/2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Utkal Auto, Cuttack and their Workman Shri Harmohan Biswal was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 21 OF 2010

Dated the 16th June 2012

Present :

Shri Raghbir Dash, O.S.J.S. (Sr. Branch),
Presiding Officer,
Industrial Tribunal,
Bhubaneswar.

Between :

The Management of . . . First-party—Management
M/s Utkal Auto,
Cantonment Road,
Cuttack.

And

Shri Harmohan Biswal, . . . Second-party—Workman
Plot No. 833, Mahanadi Vihar,
Cuttack-753 004.

Appearances :

Shri R. N. Rath,
Authorised Representative. . . For the First-party—Management

Shri Trilochan Lenka and
Shri S. N. Biswal,
Authorised Representatives. . . For the Second-party—Workman

AWARD

The Government of Odisha in the Labour & Employment Department (Presently, the Labour & E.S.I. Department) in exercise of powers conferred upon them by sub-section (5) of Section 12 read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) for short the Act, have referred the following dispute for adjudication vide their Order No. 3716—ID.-9/2010-L.E., dated the 6th May 2010.

"Whether the termination of service of Shri Harmohan Biswal, ex-Sales Assistant with effect from the 9th May 2009 by the management of M/s. Utkal Auto, Cuttack is legal and/or justified ? If not, to what relief the workman Shri Biswal is entitled ?"

2. According to the claim statement, the workman joined with the first-party in December, 1982 as a Sales Executive on probation. In April, 1984 his service was regularised. Till 8-9-2009 he was in continuous service under the first-party. With effect from the 9th May 2009 he was refused employment. The termination of service by way of such refusal was effected without compliance of the provisions contained in Section 25-F of the Act. That apart, after his retrenchment the management has engaged a new employee to work in his place. The retrenchment being illegal he prays for reinstatement with full back wages. It is specifically pleaded that ever since the date of retrenchment the workman has been going without any gainful employment.

3. In the written statement the first-party does not dispute that the second-party was in continuous employment from December, 1982 to Dt. 8-5-2009 as Sales Executive. However, it is contended that there was no refusal of employment as alleged by the second-party. According to the management, it was the second-party who, remaining absent from duty from 11-5-2009 onwards and having not resumed duties even though the management sent him intimation to join, has voluntarily abandoned his job. Further contention of the first-party is that the second-party is not a 'Workman' as defined under the Act. Regarding gainful employment, the first-party contends that after abandonment of his job the second-party has been in gainful employment elsewhere.

4. Basing on the pleadings of the parties, the following issues have been settled :—

ISSUES

- (i) Whether the reference is maintainable ?
- (ii) Whether the second-party is a 'Workman' as defined under the Industrial Disputes Act ?
- (iii) Whether there was termination of service of Shri Harmohan Biswal with effect from the 9th May 2009 by the management of M/s. Utkal Auto, Cuttack and if so, if it is legal and/or justified ?
- (iv) Whether the second-party is entitled to any relief ?

5. To substantiate their respective contention the parties have examined witnesses and exhibited documents. The second-party has examined himself as W.W. No. 1 whereas the management has examined its Manager as M.W. No. 1 and one of its ex-Mechanic as M.W. No. 2. Exts. 1 to 6 have been marked on behalf of the second-party and Exts. A to F have been marked on behalf of the first-party.

FINDINGS

6. *Issue Nos. (i) and (ii)*—According to the first-party, the reference is not maintainable in as much as the second-party is not a 'Workman' as defined under the Act. Issues have been framed on these contentions but the parties have not adduced evidence as to what was the nature of duties attached to the post the second-party had held. Even in the written statement it is not elaborated as to why the second-party is not a 'Workman'. It is simply pleaded that the second-party is not a 'Workman' as defined under the Act. In the Schedule of reference the second-party is described as an ex-Sales Assistant. In the claim statement it is stated that the second-party was a Sales Executive. Also in the Attendance Register marked Ext. B the second-party is described as a Sales Executive. But, in Ext. C, the copy of Register of Adult Workers maintained by the first-party, it is stated that the nature of work of the second-party was that of a Workshop In-charge. Save and except the aforestated materials there are no other materials to ascertain the second-party's nature of duties. In the absence of such materials it is difficult to conclude that the second-party was employed in a supervisory capacity or by the nature of duties attached to his post or by reason of the powers vested in him he used to function in a managerial capacity. Therefore, it is not possible to hold that the second-party is excluded from the definition of 'Workman'. Even if it is held that his nature of work was that of a Workshop In-charge, it cannot be said solely on that description that his work was supervisory in nature. Therefore, it is held that the second-party comes within the definition of 'Workman'.

On the maintainability of the reference no other ground has been specified. Therefore, basing on the findings on issue No. (ii) the issue on maintainability of the reference is answered in the affirmative.

7. *Issue No. (iii)*—According to the second-party, employment was refused to him when he went to join his duty on 9-5-2009. But, according to the first-party, the second-party had worked even on 9-5-2009 and thereafter, on 11-5-2009 and 12-5-2009, he came to duty, signed the Attendance Register but left the work place and after that he had never come to report for duty. Ext. B, the Attendance Register for the month of May, 2009 reflects that the second-party has put his signature on the 9th, 11th and 12th May, 2009 but as against his signature dated the 11th and 12th May, 2009 there is mark of absence. The second-party in his cross-examination has stated that on 9-5-2009 he performed his duties and on 11-5-2009 he signed the Attendance Register but he was not allowed to work. Though Ext. B reflects that on 11-5-2009 and 12-5-2009 the workman had put his signature, there is no doubt that on those dates the workman did not perform his duties. Merely on the basis of Ext. B there cannot be a conclusion as to whether the workman was refused employment even though he had reported for duty or the workman, despite of putting signature on the Attendance Register, left the work place on the last two dates and thereafter voluntarily remained absent. Therefore, the other facts and circumstances are to be taken into consideration.

8. In the written statement it is stated that when the workman absented from duty intimation was sent to him to join his duty. Though M.W. No. 1 is the Manager of the first-party, he has not stated in his evidence that any intimation was sent to the second-party asking him to report for duty. However, the management tries to prove that fact by examining M.W. No. 2, who has claimed that after the second-party had remained absent from duty he was sent by the management twice to request the second-party to join duty. The witness says that on two occasions he had requested the second-party to join duty but he refused. Notice in writing was never served on the second-party. It is difficult to place reliance on the oral evidence of M.W. No. 2 who is found to be interested in the management. Though he claims that he is an ex-employee of the first-party, he has admitted that in 2006 he took voluntary retirement and thereafter he has been working under the first-party on contractual basis to transport two-wheelers to different sub-dealers. Thus, he is still getting his employment from the first-party. Even then in his cross-examination he has admitted that on the refusal of the second-party to accept the Voluntary Retirement Scheme offered by the first-party employment was refused to him. Even the Manager says that three to four years back the management introduced Voluntary Retirement Scheme which was accepted by almost all the employees but the second-party did not accept it.

There are some other materials showing that the second-party had incurred displeasure of the first-party. Ext. C is the workman's representation dated the 3rd April 2009 demanding for higher salary and better emoluments. Ext. D is his another representation dated the 24th April 2008 addressed to the District Labour Officer, Cuttack wherein he has alleged against the management that the latter was planning to oust him from employment. It is admitted by the management witnesses that the management's Voluntary Retirement Scheme was accepted by almost all the employees but the workman refused to accept it. Thus, there are grounds to believe that the relationship between the parties was not cordial. Admittedly, the second-party had already served for a long period of more than 26 years. There was no allegation of any misconduct during the long period of his service. He served the entire period remaining in the same post. Therefore, it is difficult to believe that he voluntarily abandoned the job.

9. The employment of the second-party was terminated on either 9-5-2009 or 11-5-2009. The second-party made a petition to the District Labour Officer, Cuttack on 5-6-2009 alleging that he was denied employment. Since the second-party raised the dispute without delay there can be a presumption that he had no intention to quit his job. Under such circumstances, the management ought to have served a written notice on the second-party inviting him to resume duties. In M.G. Patel Vrs. Mastanbaug Consumers Co-operative W & R Stores Ltd., 1997 Lab. I.C. 2537, Hon'ble Bombay High Court have held that the burden lies on the employer to establish and prove that the employee had abandoned service with further observation that even in the case of abandonment of service the employer has to give notice to the employee calling upon him to resume his duty and if the employee does not turn up despite such notice the employer should hold an enquiry on that ground and then pass appropriate order of termination. In the case at hand the management has failed to discharge the burden of proving the alleged abandonment of service. Notice having not been served on the workman and domestic enquiry not conducted and with the availability of other circumstances supporting the workman's plea of refusal of employment, it is to be held that this is a case of termination of service by way of refusal of employment. On the testimony of the workman it is to be further held that the refusal was with effect from 9-5-2009.

10. Admittedly, the mandatory provisions contained in Section 25-F of the Act were not complied with nor any domestic enquiry was conducted. Therefore, the retrenchment is illegal. The management also does not produce materials for a conclusion that the refusal of employment was justified.

11. *Issue No. (iv)*—The retrenchment is illegal, unjust and arbitrary. The second-party had served the first-party for a long period. Considering his nature of employment and other circumstances it is held just and proper to award the relief of reinstatement with full back wages. Accordingly, the reference is answered in favour of the second-party. The first-party to reinstate the workman and to pay full back wages within two months of the date of publication of the Award in the Official Gazette.

Dictated and corrected by me.

RAGHUBIR DASH

16-6-2012

Presiding Officer

Industrial Tribunal

Bhubaneswar

RAGHUBIR DASH

16-6-2012

Presiding Officer

Industrial Tribunal

Bhubaneswar

By order of the Governor

T. K. PANDA

Under-Secretary to Government